

ARKANSAS INSURANCE DEPARTMENT

IN RE AMBULATORY SURGICAL CENTERS

AID ORDER # 2020-69A

THIRD AMENDED ORDER GRANTING PETITION FOR DECLARATORY RULING

Comes now the Arkansas Insurance Department (“Department”), by and through its attorney, Booth Rand, and, for its Order, states the following findings:

1. On October 26, 2019, original Petitioners (Fair Park Surgery Center, Centerview Surgery Center LLC, South Arkansas Surgery Center, Advanced Ambulatory Surgery Center LLC, Executive Park Surgery Center of Fort Smith Inc., Eye Surgery Center of Arkansas, Novamed Surgery Center of Jonesboro, LLC, Freeway Surgery Center, Central Arkansas Surgical Center, and the Gastroenterology and Surgery Center of Arkansas II, LLC) (“Original Petitioners”) filed a Complaint against Arkansas Blue Cross and Blue Shield (“ABCBS”) at the Department alleging, inter alia, that ABCBS is in violation of Ark. Code Ann. § 23-79-115(a) for reimbursing outpatient services provided at their facilities at rates below those paid by ABCBS to hospitals and/or hospital-owned outpatient facilities for substantially similar or identical procedures or services.

2. On November 6, 2019, ABCBS responded and denied the Complaint maintaining that Ark. Code Ann. § 23-79-115(a) does not require provider payment parity between hospital outpatient surgery departments and ambulatory surgical centers. ABCBS explained that Ark. Code Ann. § 23-79-115(a) only applies to the contract and relationship between insurers and insureds and not to the payment relationship between insurers and medical providers which might provide covered treatment.

3. After review of the Complaint and response(s), the Department issued a November 12, 2019 letter to ABCBS stating that the plain language of Ark. Code Ann. § 23-79-115 requires payment or reimbursement for healthcare services provided to hospitals and related facilities to be made on an equal basis whether the service is performed by hospitals / hospital outpatient surgery departments or ambulatory surgical centers. In its November 12, 2020 letter, the Department stated that ambulatory surgical centers were not reimbursed on an equal basis, and the Department demanded that payments plus interest be made where they were paid less than hospitals or related facilities for the same services. On or about November 22, 2019, this demand was withdrawn by electronic email from the Department to ABCBS, indicating the need for an administrative hearing on the issue.

4. On June 15, 2020, the Arkansas Insurance Commissioner (“Commissioner”) granted the complaint of the Original Petitioners as a request for a Declaratory Ruling. The Department subsequently then issued Department Bulletin 27-2020 advising the public and interested persons of the matter, inviting interested persons of intervening no later than August 3, 2020.

5. On or about July 28, 2020, the Commissioner appointed Honorable Judge Ellen Brantley to preside over the matter as hearing officer.

6. On August 3, 2020, the Department received petitions to intervene from additional ambulatory surgery facilities: Bozman-HOF Eye Surgery and Laser Center, Harrison Surgery Center, Advanced Interventional Pain Surgery Center, Surgery Center of Northeast Texas, Taylor Surgery Center, Spring Creek Surgery Center, Physicians Day Surgery Center, Mountain Home Surgery Center, Precision

Surgical Center of Northwest Arkansas, Central Arkansas Surgery Center, Arkansas Center for Surgical Excellence, and Executive Surgery Center of Little Rock ("Intervening Petitioners"). On or about August 6, 2020, Central Arkansas Surgical Center withdrew from the original Complaint. On September 1, 2020, in an administrative conference hearing, these petitions to intervene were granted. For purposes of this Order, the Original Petitioners (less Central Arkansas Surgical Center) and the Intervening Petitioners shall be referenced as "Petitioners," "ASCs," or "ambulatory surgery centers."

7. On September 1, 2020, during an administrative conference hearing, the parties discussed whether the Department had an adequate legal basis in rulemaking powers to issue a declaratory order in the current proceeding. The Department discussed the option of the Department filing for an emergency and permanent rule to issue declaratory orders. Out of an abundance of caution, the Department issued Emergency Rule 121, "Declaratory Orders," effective October 1, 2020. The Department also issued Rule 121 as a permanent Rule.

8. On October 22, 2020, the Petitioners filed a Petition for Declaratory Relief and Damages, alleging ABCBS was in violation of Ark. Code Ann. § 23-79-115 and, inter alia, incorporated their earlier October 26, 2019 Complaint, to comply with Section Four (4) of Department Rule 121. In their requests for relief, Petitioners seek (1) reinstitution of the earlier declaratory hearing to determine that ABCBS's practices violate Ark. Code Ann. § 23-79-115; (2) a finding that ABCBS is required under 23-79-115 to pay Petitioners at rates equal to rates for the same procedures whether performed in a hospital outpatient setting or performed in an ASC setting; (3) discovery into the payment rates of ABCBS by procedure code for the hospital outpatient setting in order to benchmark against the rates actually paid to them; and (4) an award of damages, and prejudgment and post-judgment interest, discretionary costs, and attorneys' fees.

9. The Commissioner maintains that this issue needs resolution and is therefore ripe for administrative review and may involve other health care insurers and outpatient center service facilities.

WHEREFORE, the Commissioner grants the Petitioners' request for a Declaratory Petition and shall set this matter for an administrative hearing and shall issue an Order or Ruling pertaining to the Complaint, following an administrative hearing on this matter, and makes the following additional Orders:

(1) The Commissioner hereby reinstitutes and reincorporates the previous action including filings, correspondence, and all other matters of the earlier record into this Rule 121 proceeding;

(2) The Commissioner appoints Honorable Judge Ellen Brantley as hearing officer to preside over this matter under Rule 121;

(3) The Commissioner finds that the Petitioners' October 20, 2020 Petition shall be considered filed for purposes of starting the ninety (90) daytime period under Section Four (4) of Rule 121 to be the date of this Order, which shall be effective, January 10, 2021, making the final order due April 10, 2021;

(4) The Commissioner finds that this matter shall be bifurcated into two (2) separate actions:

(1) the first declaratory action is to consider the following declarations:

(A) Whether Ark. Code Ann. § 23-79-115 applies to private contracts between insurers and licensed outpatient/ambulatory surgery centers;

(B) If it is determined that Ark. Code Ann. § 23-79-115 applies to private contracts between insurers and licensed outpatient/ambulatory surgery centers, then whether the statute is affected or superseded by other state law, including but not limited to the Patient Protection Acts.

(2) the second declaratory action is to consider the following declaration:

(A) If it is determined that Ark. Code Ann. § 23-79-115 applies to private contracts between insurers and licensed outpatient/ambulatory surgery centers, then what is the meaning of “equal basis” as that phrase is used in Ark. Code Ann. § 23-79-115;

(5) If the declarations apply to this matter, the Commissioner shall determine payment differentials, if any, under the examination provisions of the Insurance Code, §§ 23-61-201 et seq., and determine prospective enforcement, from the date of a final order.

(6) The Commissioner finds that there shall be a separate ninety (90) days under Section Four (4) of Rule 121 to render an Order on the second separate declaratory action, if applicable, following issuance of a final Order in the first declaratory action;

(7) The Commissioner hereby declines the Petition request for a declaratory ruling for damages, discretionary costs, and attorney’s fees, as the Commissioner is not authorized by law to issue Orders awarding damages, discretionary costs or attorneys’ fees;

(8) The Commissioner hereby declines Petitioner’s request to award restitution under Ark. Code Ann. § 23-61-110(a)(3), or interest.

(9) The Commissioner hereby grants discovery to any party to the extent it is permitted by the appointed hearing officer.

(10) Nothing in this Order is intended to be a final order.

3-9-2021

DATE



Alan McClain

Insurance Commissioner

State of Arkansas